IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.64 OF 2005

Bomi Jal Mistry and others Petitioners

versus

Joint Charity Commissioner of Mumbai and others Respondents

Mr.Anney i/by Uma Wagle, adv. for petitioners.

Respondent no.1 is a formal respondent.

Mr.Anturkar i/by Mulla & Mulla, adv. for respondents 2 and 3.

Mr.V.A.Thorat - Advocate General with Mr.P.A.Sawant i/by Gagrat & Co; adv. for respondent no.4.

CORAM : H.L.GOKHALE AND
S.C.DHARMADHIKARI, JJ.

DATE : 25th January 2005

ORAL JUDGEMENT (PER : H.L.GOLHALE, J.) :-

1. The petitioners herein claim to be beneficiaries of a public trust known as M.J.Wadia Fire Temple Trust. Respondent no.7 to this petition is this trust and respondents 2 to 4 are the trustees thereof. Respondent no.5 is a developer of property who is developing a part of this trust property. Respondent no.6 is

Municipal Corporation of Mumbai and the first respondent is the Joint Charity Commissioner whose order dated 15th September 2004 passed on an application filed by the petitioners herein u/s 41E of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "BPT Act" for the sake of brevity) is under challenge in this petition.

2. Respondent no.7 trust is carrying on certain construction activity with the help of the above developer in the interest of the said trust and for obtaining necessary funds for the maintenance of Fire Temple and various objectives. The petitioners contend that the construction which is being carried on is an illegal one and in excess and beyond the permission granted by the Joint Charity Commissioner. They have various grievances with respect to this construction which construction is almost complete by now. The petitioners filed two applications bearing Nos.6 and 7 of 2004 before the Joint Charity Commissioner. We are concerned with Application No.6 of 2004. This application although claims to have been filed u/s.41E as well as Section 50 of the BPT Act, contains essentially various prayers for injunction which are relatable only

to Section 41E of the BPT Act. Section 50 provides for mechanism for filing of a suit by or against or relating to the public trust, trustees or others. The prayers in this application are entirely such which are covered u/s 41E of this Act. This application was heard by the Joint Charity Commissioner and was dismissed by the impugned order. Being aggrieved by this order the present petition has been filed.

3. Mr.Thorat, learned Advocate General appearing for respondent no.5 trust has raised a preliminary objection with respect to the maintainability of this petition. He submitted that under sub section 5 of Section 41E of BPT Act an alternate and efficacious remedy is available to a person who is aggrieved by any such order. Under that sub section ‘an appeal lies to the Court’ and Court is defined u/s 2(4) of their act to mean the City Civil Court in Greater Mumbai and else where the District Court. The submission is that instead of filing a writ petition the petitioner ought to have challenged the order passed by the Joint Charity Commissioner by resorting to the necessary proceeding under sub section 5 of Section 41E of BPT Act, which is an alternative and efficacious

remedy provided under the statute. The submission of Mr.Thorat is adopted and supported by Mr.Anturkar learned counsel appearing for respondent nos.2 to 4 who also submitted that for the same reason the petitionbe dismissed.

4. With a view to appreciate submissions raised on behalf of these respondents, it will be advisable to refer to Section 41E of BPT Act which reads as follows :-

> "41E - Power to act for protection of Charities:
>
> (1) Where it is brought to the notice of the Charity Commissioner either by the Deputy or Assistant Charity Commissioner through his report or by an application by at least two persons having interest supported by affidavit :
>
> (a) that any trust property is in danger of being wasted, damaged or improperly alienated by any trustee or any other person, or
>
> (c) that the trustee or such person threatens or intends to remove or dispose of that property,
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> the Charity Commissioner may by order grant a temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of such property, on such terms as to the duration of injunction, keeping an account, giving security, production of the property or otherwise as he thinks fit.
>
> (2) The Charity Commissioner shall in all

such cases, except where it appears that the object of granting injunction would be defeated by delay, before granting an injunction, give notice of the facts brought to his notice to the trustee, or the person concerned.

(3) After hearing the trustee or person concerned and holding such inquiry as he thinks fit, the Charity Commissioner may confirm, discharge or vary or set aside the order of injunction or pass any other appropriate order.

(4) In case of disobedience or breach of any injunction, any of its terms or any order passed under this section, the Charity commissioner may apply to the Court, which may, after hearing the Charity Commissioner and the party affected, order the property of such person, guilty of such disobedience or breach to be attached, and may also order such person to be detained in jail for a term not exceeding six months. No attachment under this sub-section shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds, the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the person entitled thereto, and thereupon, the temporary injunction granted, or any order passed, by the Charity Commissioner, under this section, if in force shall stand vacated, or as the case may be cancelled.

(5) A trustee or a person against whom the order of injunction or any other order under this section is passed may, within ninety days of the date of communication of such order, appeal to the Court against such order.

(6) The order of the Court attaching the property of such person or detaining such person in civil prison shall be a decree appealable to the High Court.

(7) The order of the Charity Commissioner shall, subject to any order of the Court

or in appeal, be final."

5. Mr.Thorat, learned Advocate General submits that although apparently the wording of sub section 5 may lead one to read that the right of appeal is restricted only to trustees or person against whom the order of injunction or any such order is passed, this right of appeal will have to be read as available when an order of injunction or any such order is not passed and to a person who is aggrieved by non grant of any such injunction or other order. Mr.Thorat has referred to a few judgements in this behalf. Firstly he relied upon the judgement of the Apex Court in the case of **State of Maharashtra Vs. Marwanjee F. Desai and others** reported in (2002)2-SCC-318 which is a judgement on a some what similar provision of Section 7 of the Bombay Government Premises (Eviction) Act, 1955. Section 7 of this Act which provides for an appeal against an order of competent authority reads as follows :-

"7. Appeals :-

(1) An appeal shall lie from every order of the competent authority, made in respect of any Government premises, under

section 4 or section 5 to an appellate officer who shall be the District Judge of the district in which the Government premises are situate, or such other judicial officer in that district, being a judicial officer of not less than ten years' standing, as the District Judge may designate in this behalf.

(2) An appeal under sub-section (1) shall be preferred -

(a) in the case of an appeal from an order under section 4, within thirty days from the date of the service of the notice relating to the order under sub-section (1) of the section; and

(b) in the case of an appeal from an order under section 5, within thirty days from the date of the service of the notice relating to the order under sub-section (1) or (2) of that section, as the case may be;

Provided that the appellate officer may entertain the appeal after the expiry of the said period of thirty days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time,

(3) Where an appeal is preferred from an order of the competent authority, the appellate officer may stay the enforcement of that order for such period, and on such conditions as he deems fit.

(4) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(5) For the purposes of this section, Greater Bombay shall be deemed to be a district and the principal Judge of the City Civil Court, Bombay shall be deemed to be the District Judge of the district."

6. The question raised in the above matter was as to whether an appeal which is contemplated under sub section 1 of this section is available to the Government where the competent authority does not pass an order of eviction as sought by the Government but passes an order dropping the proceeding before it. The Apex Court answered that question in the affirmative and held that the use of words "every order" in sub section 1 of section 7 of the said act comprehensively covered all decisions reached by competent authority under sections 4 and 5 of that Act, and the dropping of proceedings cannot possibly be termed as "not an order". On a similar construction the learned Advocate General submits that where an injunction is declined, that would also be an order which would be appealable under sub section 5 of Section 41E of the BPT Act.

7. The learned Advocate General further submitted that this sub section 5 uses the adverb "against" while referring to an order of injunction. The word "against" will mean something adverse or contrary to the interest of the party concerned. For that purpose he referred to the discussion of the Apex Court on this term in the case of **Kehar Singh Vs. State**

**(Delhi Administration)** reported in (1988)3-SCC-609 and particularly para 238 thereof. This was in the context of Section 6 of Commissions of Inquiry Act, but the interpretation with respect to the term "against" given in the judgement would hold good even while construing the term "against" in the present section. That apart, he pointed out that sub section 5 refers to not merely injunction but also to any other order under this section. Besides the right of appeal is given to a trustee as also to a person. The right of appeal is not confined merely to a trustee and when we look to the term "person" we find that in sub section 1 of Section 41E of BPT Act, the term "person" is referred in two different situations. It is referred by way of a person who is making an application and also a person against whom any such order is passed. As regards the words "any other order" the learned Advocate General drew our attention to the judgement in the case of **Lucknow Development Authority Vs. M.K.Gupta** reported in AIR-1994-SC-787 which refer to Black's Law Dictionary to the effect that the word "any" has a diversity of meaning and may be employed to indicate all or every as well as the same or one and its meaning in a given statute

depends upon the context and subject matter of the statute. That being so, the words "any order" has a wider connotation which will have to be born in mind. He drew our attention to the judgement of a Single Judge of this Court in the case of **Rajendraprasad R. Singh Vs. Municipal Corporation of Greater Bombay** reported in 2003(3)-Mh.L.J.757 where the learned Single Judge while dealing with Order 39 Rule 2 of CPC held that granting of an ex-parte ad-interim injunction as well as order declining to grant ex-parte temporary injunction and issuance of a notice will all have to be held as orders under Rule 39 Rules 1 or 2 and if the first one is appealable, so must be the second. Learned Advocate General, therefore, submitted that the petitioners had an alternate and efficacious remedy which they ought to resort to.

8. Mr.Anturkar, learned counsel for the trustees supported these submissions of Advocate General. He drew our attention to the different kinds of orders that the Charity Commissioner may pass under sub section 1 of Section 41E of BPT Act. He submitted that the words of this sub section clearly indicate that the Charity Commissioner has undoubtedly power to grant temporary

injunction. However, over and above that, he may make such other orders for the purposes of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property. This he can do on such terms as he thinks fit. In the instant case, Mr.Anturkar drew our attention to the prayers of the application which were moved before the learned Charity Commissioner. Prayer clause (H) of the application prayed for appointment of an Architect or a Commissioner to assess the work carried out/being carried out and which was disputed. An order was initially passed appointing Commissioner, and his report was received. Mr.Anturkar submits that the order appointing the Commissioner is passed under sub section 1 of Section 41E of BPT Act. It is only thereafter that the impugned order declining injunction has come to be passed under sub section 3 of the said section. Sub section 3 empowers the Commissioner to either confirm, discharge of vary or set aside the order of injunction or pass any other appropriate order. Mr.Anturkar submits that the present impugned order is thus clearly referable to sub section 3 and the same was appealable under sub section 5 of the said section. Mr.Anturkar, therefore,

submitted that the present petition was not at all tenable.

9. Mr.Anney, learned Senior Counsel appearing for petitioners countered these submissions by submitting that an appeal is a creature of statute and appeal has got to be specifically provided. He submitted that sub section 5 will have to be read as it is. In his submission there was no need to read for any such appeal where an order of injunction was not granted. The wording of this sub section was clear and it is only a trustee or a person against whom an order of injunction or any other order is passed had the right of appeal and that too when such an order of injunction was passed. For preferring the appeal these two conditions had to be satisfied. In the present case no such order of injunction was granted against the trustees. In fact the same was declined and therefore, the appeal would not be available. If the legislature had not provided an appeal the party could not avail of it nor should Court read it into the section. Mr.Aaney submitted that the decision in the case of Merwanjee P. Desai (supra) was distinguishable since the wordings of section 7(1) of Bombay Government Premises

(Eviction) Act is wider since thereunder an appeal is available against ‘every order made by the competent authority’. The provision under section 41E(5) was a narrower one.

10. We have considered submissions made by the counsel on both sides. Although there is good force in the submissions of Mr.Aaney that the section has to be read as it is, when we read the section what we find is that the section speaks about an order of injunction or any other order and the same is made appealable. In our understanding, the submission that an order declining injunction is not an order, can no longer stand in view of the interpretation given to a some what similar provision of the wording of section 7 of the Bombay Government Premises (Eviction) Act, 1955 by the Apex Court in Merwanjee Desai’s case (supra). In that matter the question was whether dropping of a proceeding can be termed as an order or not and the Apex Court has held that dropping of an order cannot possibly be termed to be "not an order". Mr.Anney is right in saying that the wording of Section 7(1) of Bombay Government Premises (Eviction) Act is more explicit but that does not mean that the wording of Section 41E(5) is a

narrower one. In the present case initially an order was passed on 4th June 2004 to appoint a Commissioner which order is clearly relatable to sub section 1 of section 41E. It is only thereafter that when parties were heard that the prayer for injunction was declined. The order passed earlier has been varied and subsequently injunction has been declined. That was the order which was sought by the petitioners herein which they sought in the interest of trust and which according to them was necessary. They had prayed for such an order. It cannot, therefore, be said that the order which declines the relief which they had sought, is not an order against them. It is also an order though an order declining injunction. It is undoubtedly an order against the interest which they claimed to have canvassed. That prayer having been rejected, if a view is taken that they do not have a statutory remedy, it will mean that sub section 5 contemplates remedy only for one set of litigants and not for another. The petitioners are also ‘persons’ within the meaning of this section who had sought the order. The Legislature cannot be attributed any such distinction when a comprehensive provision is made to protect the charities. Under sub section 1 the Charity

Commissioner is empowered to pass various kinds of orders and then he has got the power to modify, vary, set aside, confirm or discharge any of these orders. When a remedy is provided under sub section 5 of the statute, it will have, therefore, to be read as a remedy against various orders which could be passed under this section and which are against the trustees or persons who may be applicants or against whom the relief is sought. As rightly submitted by learned Advocate General, the term "any other order" will have to be read widely and cannot be restricted only to an order which grants an injunction against the trustee or a person.

11. For the reasons stated above, we accept the objections raised by the respondents herein. It is a valid objection and the appropriate remedy for the petitioner is to resort to the remedy which is available under sub section 5 of Section 41E of BPT Act which is alternative and efficacious remedy. Petition is, therefore, dismissed.

(H.L.GOKHALE, J.)

(S.C.DHARMADHIKARI, J.)